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OFFICE OF PETITIONS

In re Application of :
Vandlik et al. :
Application No. 10/828,440 : DECISION ON PETITION
Filed: 17 April, 2004 :
Attorney Docket No. F-5482 DIV :
2 (0360-0159. :

This is a decision on the petition, filed on 18 January, 2006, under 37 CFR 1.10(d), which is treated as a petition requesting that the above-identified application be accorded a filing date of 20 April, 2004, rather than the presently-accorded filing date of 17 April, 2004.

The petition is dismissed.

Petitioners allege that the application was deposited in Express Mail service on 20 April, 2004.

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date.¹ (emphasis added)

Paragraph (d) of 37 CFR 1.10 states that:

¹ See 37 CFR 1.6(a).

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

Petitioner asserts that the above-identified application was deposited with Express Mail Post Office to Addressee service of the USPS on 20 April, 2004.

The showing of record has been considered, but is not persuasive. In regard to 37 CFR 1.10(d), petitioner has not presented corroborating evidence that the correspondence was deposited in Express Mail service prior to the last scheduled pickup for that day. If the error was due to the USPS entering the wrong date on the Express Mail label, petitioners should request a letter from the USPS stating that the correct date of deposit is 20 April, 2004, and explaining why the error occurred. Additionally, petitioners may provide evidence that came into being after deposit and within one business day of deposit of the application in Express Mail. Such evidence may include a mail log with an

entry made after the application was deposited in Express Mail, or a letter to the client sent after the mailing of the application confirming the mailing of the application.

As such, since the transmittal letter for the application was obviously created prior to the mailing of the application, it therefore cannot serve as evidence created after and within one business day of the date of deposit of the application in Express Mail. Further, petitioners are reminded that there is no provision in the rules for use of a certificate of mailing when application papers are sent by Express Mail service.²

It is suggested that petitioners obtain a statement from the USPS stating that the correct date of deposit of the Express Mail envelope in question (*i.e.*, EV318693209US) was deposited in Express Mail Post Office to Addressee Service on 20 April, 2004. This statement should be provided with any renewed petition.

Any request for reconsideration (no further petition fee is required) must be filed within TWO MONTHS of the date of this decision in order to be considered timely [37 CFR 1.181(f)]. The request should be addressed as follows:

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

By FAX: (571)273-8300
Attn: Office of Petitions

By hand: Customer Service Window
Mail Stop Petition
Randolph Building
401 Dulany Street
Alexandria VA 22314

² The requirement of 37 CFR 1.10(c) for a certificate of mailing has been waived by the Commissioner. See 1174 O.G. Pat. Of. 92 (May 16, 1995).

The address in the petition is different than the correspondence address of record. A copy of this decision is being mailed to the address in the petition. All future correspondence will be mailed solely to the address of record.

Telephone inquiries concerning this matter may be directed to the undersigned at (571)272-3231.



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